Filed 3/25/14 P. v. Alanis CA5



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MARCO ANTONIO ALANIS,<br><br>Defendant and Appellant. | F064925<br><br>(Super. Ct. No. MCR040897)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Madera County. Joseph A. Soldani, Judge.

Dale Dombkowski, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Alice Su, Deputy Attorneys General for Plaintiff and Respondent.

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After breaking into his ex-girlfriend's apartment and attacking her, Marco Antonio Alanis was convicted of burglary, assault with a knife, making a criminal threat, and domestic battery. He argues that there was error in the jury instructions and that his trial

counsel was ineffective in not objecting to the instructions. We find no prejudicial instructional error.

We agree with Alanis that the trial court erred in imposing an unstayed sentence for a weapon enhancement in connection with the criminal threat charge, even though the sentence for the underlying conviction on that charge was stayed pursuant to Penal Code section 654.[1] We will modify the judgment to stay the enhancement and affirm the judgment as modified.

## ***FACTS AND PROCEDURAL HISTORY***

Police were dispatched to the apartment of Stephanie Avalos around 11:00 or 11:10 a.m. on May 15, 2010. Alanis was Avalos's ex-boyfriend and the father of one of her children. Avalos reported that Alanis had broken open the door of the apartment and assaulted her.

The district attorney filed an information charging Alanis with four counts: (1) burglary (§ 459); (2) assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1)); (3) making a criminal threat (§ 422); and (4) misdemeanor domestic battery (§ 243, subd. (e)(1)). In connection with count 3, the information alleged that Alanis used a deadly weapon. (§ 12022, subd. (b)(1).)

At trial, a police officer testified that when he responded to the dispatch, Avalos told him Alanis had come to the door and demanded to be admitted. Avalos said no, locked the door, ran into her bedroom and hid under the covers. Alanis broke open the door, went to the bedroom, and pulled the covers off of Avalos. He saw that she had hickeys on her body and reacted violently. He grabbed her by the hair, slapped her six times, held a knife to her throat, and called her a "fucking whore." Then he walked around the apartment breaking things, including a fan. He removed the power cord from the fan and held it up to Avalos. Avalos had fresh, red abrasions on her wrists, appeared

[1]Subsequent statutory references are to the Penal Code unless otherwise noted.

to have been crying, and spoke in a scared or stressed tone of voice. The officer saw the broken fan and other displaced and damaged items around the apartment, and saw that the front door was damaged.

Avalos testified consistently with the officer's testimony and added some points. She said Alanis removed the cord from the fan by cutting it with a pocketknife. Then he wrapped the cord around his hands and said he was going to choke Avalos with it. Next, he put the cord down and held the pocketknife to Avalos's throat. "He said I deserve to die. That I deserved a near-death experience just like he had." Avalos was asked what near-death experience Alanis could be referring to, but a relevance objection was sustained.

Avalos testified that after threatening her with the knife Alanis cut himself. He left blood on the kitchen floor, the back door, and the back porch. Jerry R., Avalos's son (10 years old at the time of trial), testified that on the day of the break-in, he returned home from his grandfather's house and saw blood on the bedroom floor and bathroom floor. The officer who responded to the 911 call, however, testified that he did not recall seeing any blood in the apartment.

When he cut himself, Alanis went from the bedroom into the kitchen. While he was in the kitchen, Avalos ran out the back door to get help. She called 911 from a neighbor's apartment. Alanis fled on his bicycle.

The jury heard evidence of prior incidents of domestic violence by Alanis against Avalos. Avalos testified that Alanis had hit her many times before. There were occasions on which, to stop her from calling for help, "[h]e would pull the cords to the phone, break the phones. Take out the battery. Stand in front of the door, wouldn't allow me to leave."

In 2005, as Avalos was preparing to leave home for an appointment, Alanis interrogated her because "he was upset about where I was going and what I was going to do …." This led to pushing and shoving. Alanis cornered Avalos between a counter and a door and would not let her leave. Avalos fought back, hitting Alanis on the shoulder

with a pan. Alanis left, and a short time later the police arrived and arrested Avalos. She was not charged.

In 2007, there was a confrontation while Avalos was pregnant. Alanis said something about kids not being "worth … having" and punched Avalos in the stomach.

On another occasion, in 2008, Alanis and Avalos were arguing in the bedroom. "There was shoving" during this argument. Alanis took out a knife and scared Avalos with it. Avalos's son, Jerry R., called the police. When the police arrived, Alanis hid the knife. Jerry R. testified that he saw Alanis try to stab Avalos and saw Alanis "socking her and slapping her."

During a period when Alanis and Avalos were broken up, Alanis once followed Avalos in his car. Late at night, as she was driving away from her workplace, he drove up behind her and followed her around town, making every turn she made. He pulled up beside her and told her to pull over. Finally, she drove to a police station and into the parking lot. An officer came out and asked what was happening. After Avalos explained, the officer directed Alanis to get out and sit on the curb until Avalos had left.

Candace Escalante, Alanis's current girlfriend at the time of trial, and Jeremy Harlow, a police officer, testified about an incident that took place in 2010. Escalante testified that she and Alanis had an argument about Rhonda Godfrey, a cancer patient for whom Escalante worked as caregiver. Escalante, Alanis, and Godfrey all lived together in Escalante's house. Alanis and Godfrey did not like each other. While Escalante and Godfrey were driving together after the argument, Godfrey insisted that Escalante stop at a police station. Harlow testified that he contacted Escalante and Godfrey in the street in front of the police station. Escalante was shaky and nervous and had tears in her eyes. She told Harlow that Alanis accused her of cheating on him and "pulled a shotgun on her and threatened to kill her." Alanis then left the room, and Escalante unloaded the shotgun. She removed the shells and her child from the house and left them at a relative's

house on the way to the police station. Escalante also told Harlow there were previous occasions on which Alanis had hit her.

Harlow went to Escalante's house, where he found Alanis and the shotgun. Escalante testified that a protective order was issued against Alanis and that the police removed him and the shotgun from the house.

Alanis presented an alibi defense. Escalante testified that on May 15, 2010, Alanis was with her at home all day. Escalante woke up at 6:00 a.m., but Alanis slept until around noon. At around noon, Alanis's father, Salvador Alanis, came to the house. He and Alanis worked on a car together. After they were finished, Alanis remained home until evening. Salvador Alanis testified that he came to Escalante's house at about 11:45 a.m. to work on a car with Alanis. Alanis looked like he had just woken up. They worked on the car for 15 minutes to an hour and then took it to its owner. Afterward, Salvador drove Alanis home. They were gone for about 20 minutes.

The jury found Alanis guilty as charged and found the enhancement allegation true. The court imposed the upper term of six years on count 1. Pursuant to section 654, it imposed and stayed a four-year term for count 2, a three-year term for count 3, and a 29-day term for count 4. For the weapon enhancement on count 3, however, the court ordered a one-year term to run consecutively to the sentence for count 1. The total unstayed term was seven years.

## ***DISCUSSION***

### *I. CALCRIM No. 207*

In accordance with CALCRIM No. 207, the court instructed the jury as follows:

> "It is alleged that the crime occurred on May 15th, 2010. The People are not required to prove that the crime took place exactly on that day, but only that it happened reasonably close to that day."

Alanis contends, and the People concede, that it was error to give this instruction. Where the prosecution's evidence establishes the day or the time of the offense and the defendant offers an alibi for that day or time, the day or time becomes material and it is

error to instruct that the prosecution need not specifically prove it. (*People v. Jones* (1973) 9 Cal.3d 546, 557, overruled on other grounds by *Hernandez v. Municipal Court* (1989) 49 Cal.3d 713; *People v. Jennings* (1991) 53 Cal.3d 334, 358-359; *People v. Barney* (1983) 143 Cal.App.3d 490, 497-498.) Under these circumstances, "[a]n instruction which deflects the jury's attention from temporal detail may unconstitutionally impede the defense. The defendant is entitled as a matter of due process to have the time of commission of the offense fixed in order to demonstrate he was elsewhere or otherwise disenabled from its commission." (*Barney, supra*, at p. 497.) For these reasons, the bench notes to CALCRIM No. 207 state that the instruction should not be given under circumstances like these. The People also concede that, because due process is at issue, the error is prejudicial unless harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

We agree with the People that the error was harmless beyond a reasonable doubt. Alanis's theory of prejudice is that the jury could have believed his alibi but found him guilty anyway because CALCRIM No. 207 erroneously stated that the date of the offenses need not be proved precisely. If the jury believed Alanis's alibi, however, it could have reached a guilty verdict only if it also believed Alanis committed the charged offenses on some day close to the day claimed by the victim. There was no evidence on which the jury could rationally have relied in so finding. The prosecution's witnesses were definite about the date of the charged offenses, and there was no evidence of any conduct on any other dates close to that date.

There was evidence of other crimes committed by Alanis against Avalos, but none of these took place on a day close to May 15, 2010. Further, the jury was correctly instructed in accordance with CALCRIM No. 852 on the proper use of the evidence of uncharged episodes of domestic violence, and with CALCRIM No. 3400, the alibi instruction stating that appellant "contends [he] did not commit [these] crimes[s] and that [he] was somewhere else when the crime[s] [were] committed. The People must prove

that [Alanis] was present and committed the crime[s] with which [he] is charged." (CALCRIM No. 3400.) Contrary to Alanis's contention, there is no probability that the jury was encouraged by CALCRIM No. 207 to substitute the prior unpunished offenses for the charged offenses. The jury simply did not believe Alanis's alibi defense.

For these reasons, we conclude there was no reversible error.

Alanis contends that his trial counsel rendered ineffective assistance by not objecting to the instruction. Because we have concluded that Alanis's defense was not prejudiced by the instruction, we need not consider whether counsel should have made an objection. (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

***II. No instruction required on viewing oral statement with caution***

Alanis maintains that the trial court erred because it did not, on its own motion, instruct the jury to view evidence of his out-of-court oral statements—that is, his threats—with caution. He says his conviction of making a criminal threat should be reversed for this reason. We disagree.

A trial court in a criminal trial must give, on its own motion, jury instructions on general principles of law relevant to the issues raised by the evidence. (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530.) It has been held that, where evidence has been presented of a defendant's incriminating, unrecorded, out-of-court oral statement, the court must on its own motion instruct that the evidence should be considered with caution. (*People v. Beagle* (1972) 6 Cal.3d 441, 455-456; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200.) We review claims of instructional error de novo. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424.)

This case is on all fours with *People v. Zichko* (2004) 118 Cal.App.4th 1055. Zichko threatened to shoot bank employees and was convicted of violating section 422. (*Zichko, supra,* at pp. 1057-1058.) He argued on appeal that the trial court erred by not instructing the jury that it should regard with caution the evidence that he made the threatening statements. (*Id.* at p. 1058.) The Court of Appeal disagreed. It concluded

that the instruction is not required where "[t]he statements constituted the crime …." (*Id.* at p. 1059.) Among other reasons for this conclusion, the court explained that the instruction "would have been inconsistent with the reasonable doubt standard of proof." (*Id.* at p. 1060.) To instruct the jury "that the statements 'should be viewed with caution,'" the court stated, "would have been at least superfluous and may have been confusing to the jury. It could have misled the jury into believing that it could find Zichko guilty even if it did not conclude beyond a reasonable doubt that the statements were made, as long as the jury exercised 'caution' in making its determination." (*Ibid.*) We agree with the *Zichko* court's analysis and accordingly hold that the instruction was not appropriate here.

Part of the court's discussion in *Zichko* focused on the fact that the threats were not admissions or confessions. This focus arose from the wording of CALJIC No. 2.71, which stated that evidence of an oral admission should be viewed with caution. (*People v. Zichko, supra*, 118 Cal.App.4th at pp. 1058-1060.) This portion of the court's analysis is not applicable to the present case, since Alanis argues that the court should have given a portion of CALCRIM No. 358—not CALJIC No. 2.71—and the CALCRIM instruction refers to an oral "statement," not an oral admission. Nevertheless, the point about confusing the jury on the reasonable doubt standard—which the court regarded as the more important part of the analysis (*Zichko, supra,* at p. 1060)—is applicable here.

It might be argued that *Zichko* is mistaken because the instruction makes the prosecution's burden heavier, not lighter: When the instruction is given, the jury is told to subject the evidence of the defendant's statement to special scrutiny before believing he made it. But where the statement—a threat—is the crime itself, we do not think a defendant is entitled to have the prosecution's burden increased in this way. When the jury is deciding whether a defendant made a threatening statement in the context of a section 422 charge, the question is the same as when a jury is considering any other element of a crime: whether the evidence shows beyond a reasonable doubt that the

element exists. It would be no more appropriate to increase this burden than to decrease it.

Alanis says *Zichko* should be rejected because it is inconsistent with *People v. Carpenter* (1997) 15 Cal.4th 312. Carpenter was convicted of several offenses, including attempted rape and murder. Before killing the victim, he said, "'I want to rape you.'" (*Id.* at p. 345.) The Supreme Court held that the trial court should have instructed the jury that it was required to view the evidence of this statement with caution. It stated that this instruction applies to "any oral statement of the defendant, whether made before, during, or after the crime." (*Id.* at p. 393.) It described Carpenter's statement as "part of the crime itself." (*Id*. at p. 382.)

*Zichko* distinguished *Carpenter* and we agree with its approach. The *Zichko* court reasoned that Carpenter's statement was part of the crime of attempted rape only in the sense that it tended to prove the required mental state. The statement itself was not the criminal act of attempted rape. By contrast, Zichko's threatening statement to the bank employees was the criminal act of violating section 422. (*People v. Zichko*, *supra*, 118 Cal.App.4th at p. 1059.) *Carpenter* did not hold that a jury must be instructed to consider with caution evidence of a defendant's statement when the statement is itself an element of the charged offense.

Responding to this analysis, Alanis says *Zichko* sets up a "false dichotomy" because there is really no difference between a statement that is evidence of a person's mental state and evidence of a statement that is an element of a crime, since the mental state is an element of the crime. We do not agree. A statement that is evidence of a mental state is not itself an element, i.e., is not itself the mental state. A statement constituting a criminal threat is the actus reus of that crime. In our view, a defendant has no right to an instruction requiring a jury to consider evidence of his criminal act itself with caution, even if that act is a statement.

We acknowledge that the Supreme Court wrote that the instruction is applicable to "any oral statement of the defendant" (*People v. Carpenter, supra*, 15 Cal.4th at p. 393) and that it reaffirmed this point more recently (*People v. Clark* (2011) 52 Cal.4th 856, 957). Neither *Carpenter* nor *Clark*, however, dealt with a statement that was an element of an offense, and we do not believe the instruction is appropriate for such a statement.[2]

Even if it were error to omit the instruction, we would hold that the error was harmless. State law error is reversible only if it is reasonably probable that the defendant would have obtained a better result absent the error. (*People v. Watson* (1956) 46 Cal.2d 818.) Alanis's defense was that he did not come to Avalos's home at all at the time of the attack. He was asleep at the time and at home all day. In his closing argument, defense counsel contended that Avalos made up the whole incident to take revenge on Alanis for leaving her for Escalante. The jury rejected that theory and concluded that it was Alanis's alibi that was made up. Avalos's account was supported by the condition of her home, as seen by the officer. Alanis's principal alibi witness—his current girlfriend, Escalante—told the police on a prior occasion that he had threatened her with a gun. There is no reasonable probability that if the jury had been instructed to regard the evidence of his threatening statements to Avalos with caution, it would have singled out that element of her account and rejected it.

Alanis contends that his trial counsel rendered ineffective assistance by not requesting the instruction. Since the instruction was not appropriate under the circumstances, counsel cannot be faulted for not requesting it. Further, because the omission of the instruction was harmless, the failure to request it cannot be an instance of reversibly ineffective assistance. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

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[2]The question of whether a jury should be instructed to view with caution evidence of an unrecorded statement alleged to violate section 422 is currently pending before our Supreme Court. (*People v. Diaz*, review granted Sept. 18, 2012, S205145.)

### *III. Sentence enhancement for count 3 must be stayed*

As the parties agree, a sentence enhancement must be stayed if the sentence for the underlying conviction is stayed pursuant to section 654. (*People v. Guilford* (1984) 151 Cal.App.3d 406, 411.) The trial court erred when it stayed the sentence for the offense in count 3 but imposed a consecutive term for the weapon enhancement on that count.

The People suggest that we remand the matter to the trial court with directions either to stay the enhancement or to strike it pursuant to section 1385. We see no purpose in remanding. The court would not have imposed an unstayed term for the enhancement if it had seen any reason for striking it. We will modify the judgment to stay the enhancement.

## ***DISPOSITION***

The judgment is modified to stay, pursuant to section 654, the weapon use enhancement term imposed for count 3. The judgment is affirmed as modified. The trial court is directed to amend the abstract of judgment and forward the amended abstract to the appropriate correctional authorities.

_____
LaPorte, J.*

WE CONCUR:

_____
Kane, Acting P.J.

_____
Peña, J.

*Judge of the Superior Court of Kings County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.